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In the Supreme Court of the United States

October Term, 1977

No. 77-367

EDWARD C. REA and 22 FORD, INC., a corporation,
Respondents,

v.

FORD MOTOR COMPANY, a corporation,
Petitioner.

Brief For Respondents In Opposition

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 77-367

EDWARD C. REA and 22 FORD, INC., a corporation,
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On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether this petition should be denied simply because it is out of time since Petitioner asserts three reasons for granting the Writ each of which was decided in the 1974 decision of the Circuit Court of Appeals and respecting each of which Petitioner here did not Petition or Cross-Petition at that time.

ARGUMENT

I. The Writ Should Be Denied Because The Petition Is Out Of Time.

A. Petitioner questions the holding of the Circuit Court of Appeals permitting the individual "person" to recover under the Automobile Dealers' Act "... even though the dealership was conducting business in corporate form." (Petition, p. 9). But this holding by the Circuit Court occurred in 1974, *Edward C. Rea and 22 Ford, Inc. v. Ford Motor Company*, 497 F.2d 577 (3rd Cir. 1974) (Appendix B, pp. 13a-41a) (*Rea I*). Indeed, in *Rea II*, the Circuit Court said, "....our first decision in this case attributed the cause of action to Rea himself." *Edward C. Rea and 22 Ford, Inc. v. Ford Motor Company*, Nos. 76-1982 and 76-1983 (3rd Cir. July 6, 1977) (Appendix A, pp. 1a-12a, 5a)

The issue of whether Rea or 22 Ford had a cause of action under the Automobile Dealers' Act against Ford for damages caused to Rea Olds was carefully analyzed and finally decided by the opinion of the Third Circuit in 1974 ordering a redetermination of damages. The Court held the cause of action to be that of Rea, not 22 Ford, as follows (497 F.2d at 584) *(Rea I)* (Appendix B, pp. 21a-22a):

> The district court held, in response to this argument, that this cause of action was included in the transfer of rights under the dealership agreement to 22 Ford in April 1966 and thus 22 Ford, as the successor to the rights of Edward C. Rea, Inc. under the franchise, was entitled to bring suit and recover damages. *Rea v. Ford Motor Co.*, 355 F. Supp. at 862-63. This analysis, however, does not entirely meet the objection raised by Ford, since it assumes one of the points in issue—whether Edward C. Rea, Inc. could recover for the damages suffered by Rea Olds. Nevertheless, we find Ford's argument on this point does not justify its contention that it is entitled to judgment on this claim, for it is based on too narrow and technical an interpretation of who the "dealer" is under the facts of

this case. Edward C. Rea was not only a signing party to the franchise agreement between Ford and Edward C. Rea, Inc., but was made essential to the operation of the dealership by its terms, which recited that Ford had entered into the agreement "in reliance (i) upon the representation and agreement that ... [Edward C. Rea] substantially participate(s) in the ownership of the Dealer ... and (ii) upon the representation that ... [Edward C. Rea] shall have full managerial authority for the operating management of the Dealer in the performance of his agreement." Rea, therefore, had a cause of action under the Automobile Dealers' Act against Ford for any bad faith in coercing him, as President and principal stockholder of Rea Olds, to surrender the Oldsmobile franchise and to recover damages suffered by Rea Olds as a result of such surrender. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 790-791 (5th Cir. 1971); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). (Petition, Appendix B, pp. 21a-22a)

In *Rea II*, speaking of the *Rea I* decision, the Circuit Court said, "Hence, the damages were properly computed with respect to Rea personally." (Appendix A, p. 5a)

Also, the Petition conveniently neglects the words "person .... operating under the terms of a franchise..." contained in the definition of "automobile dealer" in the statute. In the Ford franchise agreement in this case, Edward C. Rea, as the 1974 opinion stated above, is specifically named as an essential party.

And further, *Vincel v. White Motor Corporation*, 521 F.2d 1113 (2d Cir. 1975), cited by Petitioner* as in conflict

*Petitioner here has made a 180 degree turn in the course of its reasoning. It argued below, at trial, and on the recent appeal that Rea should be paid the damages and not the plaintiff corporation. It now conveniently ignores this previous position. This is patently unjust and absurd. Cf. *Weade v. Dickmann, Wright & Pugh*, 337 U.S. 801 (1949); *Corbin v. Baltimore & Ohio Railroad Co.*, 234 F.2d 78 (6th Cir. 1956).

with *Rea I*, is clearly a different case: Rea was sole shareholder of both simultaneously operating dealerships when the wrongdoing occurred, and he was forced to sell out of one of them, a prosperous business. In *Vincel* there were multiple shareholders quarreling over the remains of a defunct business. They were not specifically named as essential parties to that franchise as was Rea in both franchises involved herein.

B. Secondly, petitioner questions "... the earlier affirmance of liability..." in *Rea I;* again it is petitioning respecting Rea I (1974) not *Rea II* (1977).

The trial from which the appeal was taken related only to the questions of the amount of damages. The jury in the original trial of this action found that Ford had not acted in good faith and awarded damages of $350,000 for the profits lost by the plaintiff due to defendant's conduct. On appeal, the Third Circuit affirmed the jury's findings in all regards except one: The jury's damage calculation did not properly reflect that assets of Rea Olds were retained by 22 Ford, *Rea I*, (Petition Appendix B, pp. 26a-27a).

Despite this holding, defendant attempted to offer evidence at the damage retrial below that Rea Olds would have been required to liquidate in order to supply sufficient capital for the Ford dealership. The District Court properly held this evidence irrelevant. "Whether this evidence comes in under the label of 'proximate cause of damages' or under the attempt to re-try liability, it is the holding of the Court that it is inadmissable." (Petition, Appendix C, p. 55a).

Petitioner asserts that the issue of causation was left open for retrial by the opinion in *Rea I*. It argues that that decision affirmed only the jury finding of bad faith by Ford and that the jury's findings of liability did not include a

finding that defendant was the cause of the damage. This argument is based almost entirely on one sentence in Judge Van Dusen's 1974 opinion:

> However, the issue before the jury was Ford's *good faith* in pressuring Rea to surrender the Oldsmobile franchise [emphasis not supplied]. 497 F.2d at 587.

This sentence occurs in the context of Judge Van Dusen's discussion of defendant's argument that it was denied a fair opportunity at the original trial to present the same evidence which was ruled irrelevant below: evidence showing that Rea Olds would have been required to liquidate its assets in order to provide 22 Ford with sufficient operating capital. In considering this argument, Judge Van Dusen examined the record and found that defendant did in fact introduce evidence at the original trial "that the assets of Rea Olds were Rea's sole source of capital for the operation of the Ford dealership." 497 F.2d at 586. Since the jury had already considered evidence on this issue and awarded damages to plaintiff, the Court found defendant's argument to be unavailing and upheld the jury finding of liability. Thus, when the above-quoted sentence is considered in context, petitioner's argument is seen to be fallacious.

Furthermore, petitioner's argument that the issue of causation was left open by the Circuit Court's earlier decision is almost identical to the argument propounded by the defendant in *Terrell v. Household Goods Carrier's Bureau*, 494 F.2d 16 (5th Cir. 1974). The Fifth Circuit had affirmed a jury finding of liability and remanded for retrial on damages. At the retrial, the jury awarded damages to plaintiff, but defendant argued on appeal of the retrial that causation was not sufficiently proved to allow the damage award to stand. In a carefully reasoned opinion by Circuit Judge Goldberg, the Fifth Circuit decided the law of the

case controlled and "the duty of a lower court to follow what has been decided at an earlier stage of the case comprehends things decided by necessary implication as well as those decided explicitly." 494 F.2d at 19. The Court then held that their earlier decision affirming the original trial court's finding of liability "necessarily encompassed the findings on the legal violation and causation or the fact of damage." 494 F.2d at 21.

Besides obviously being out of time now, this issue in this case is not of sufficient importance for the cognizance of this Court. The question concerns the admission of evidence, a matter which rests squarely within the sound discretion of the trial court. That discretion has been affirmed by the Third Circuit Court of Appeals. Petitioner has not shown that this is an important question of federal law deserving this court's time and attention.

C. Petitioner complains it had no opportunity to defend the Automobile Dealers' Act claim *at the first trial*. Again it is asking review of *Rea I* (1974) not *Rea II* (1977). The Complaint filed in 1967 alleged a cause of action under the Automobile Dealers' Act. This powerful large multinational corporation was at all times represented by counsel. These counsel heard the witness-plaintiff Rea testify *at the first trial* in 1972 about his franchise and that Ford had failed to act in good faith under it. Included in Rea's testimony was evidence that Ford would not permit him to retain the Rea Olds dealership. Rea was one of the earliest witnesses. Days of trial including presentation of defense followed. Ford had every opportunity to rebut this evidence. It is astonishing that Ford's counsel now asks this prestigious Court to review this.

The 6 person jury figured out what was going on:

APPENDIX TO OPINION OF APRIL 26, 1974

in

REA, et al, v. FORD MOTOR COMPANY
(3d Cir. No. 73-1190, at 1670a-1672a)

SPECIAL VERDICT

In accordance with instructions of the court, the jury hereby finds as follows:

• • • • •

(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers' Act?

Answer: "Yes".

If your answer is "yes", what amount of damages do you award plaintiff, 22 Ford, Inc., for this breach of duty?

Answer: "$350,000.00."

• • • • •

(Signed by the Jury.)

May 25, 1972.

(Petition, pp. 38a-39a).

RESPONDENTS' REQUEST FOR COSTS

This petition is based on grounds that are obviously frivolous. Petitioner is making an argument to this Court for the first time in all this litigation contrary to that it had repeatedly made below — an argument which if correct could increase Petitioner's damages! Petitioner is not seeking any correct rule of law, but merely wishes to prolong the litigation with consequent additional expenses to Respondents.* Respondents therefore respectfully request this Court to order that petitioner pay respondents' costs in responding to this petition.

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*For this Court to do other than this suggestion would be disastrously expensive for this single garage keeper Respondent pitted against the resources of one of the very largest corporations in the world. This respondent cannot afford further proceedings.

This Complaint was filed March 6, 1967. This David is weary and this Goliath is clearly not.

Plaintiffs were wrongfully treated. A statute of the United States Congress was violated by the Defendant. *Rea v. Ford Motor Company*, 497 F.2d 577 (1974). Sometime, somewhere, there must an end—an award to make restitution.

A few years ago this court said:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

Basic antitrust prosecution and enforcement are of course carried on by the Department of Justice Antitrust Division and the Federal Trade Commission. But government enforcement is inevitably selective, and is subject to political and budgetary variations. The private action is available to any injured business whether the government has shown interest in the particular matter or not. One former Assistant Attorney General in charge of the Antitrust Division has asserted that, as between governmental enforcement and that of private parties, private relief is both more desirable and more effective. Statement by Lee Loevinger, *Hearings Before the Subcom. on the Study of Monopoly Power of the Senate Select Comm. on Small Business*, 85th Cong., 2d Sess., at 7 (1958).

It is enormously discouraging and dispiriting to those who bring the private action, not only to recover their damages, but also to vindicate the

(continued)

fair observance of the free market—the free enterprise economic and political system—to endlessly expend their resources in trial and appeal and remand and rehearing and appeal *ad infinitum*.

Further expense to the original plaintiffs here would impose an awesome burden upon them to vindicate their clear statutory claim. This would serve only to discourage other "private attorneys general", thereby enabling violators to profit and escape penalty for their unlawful acts. This litigation is now in its tenth year and has been marked by enormous cash expenditures just to keep going.

II. CONCLUSION

All of the issues above were presented by the original decision of the Circuit Court of Appeals in *Real I* (1974) and it would be inappropriate for the Court to consider them at this late date. Also, on the unique facts of this case, the decision of the Third Circuit is entirely appropriate. For the reasons given, the Petition for a Writ of Certiorari should be denied and Respondents awarded their costs.

Respectfully submitted,

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